No. 00-1342

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

RACAL SURVEY U.S.A., INC.; NCS INTERNATIONAL, INC.
Plaintiffs-Counter Defendants-Appellees,

v.

M/V COUNT FLEET, her engines,
tackle, furniture & appurtenances in rem, *et al.*,
Defendants,

TIDEWATER MARINE INTERNATIONAL, INC.,
Counter Claimant-Appellant.

RACAL SURVEY U.S.A., INC.; NCS INTERNATIONAL, INC.,
Plaintiffs,

v.

M/V COUNT FLEET, her engines,
tackle, furniture & appurtenances in rem, *et al.*,
Defendants,

TIDEWATER MARINE INTERNATIONAL, INC., INTERVENOR
Defendant-Appellant-Cross-Appellee,

v.

INPUT/OUTPUT, INC., INTERVENOR
Plaintiff-Appellee-Cross-Appellant.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Fifth Circuit

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REPLY BRIEF

W. J. LARZELERE, JR., T.A.
J. CALVIN BOX
LARZELERE & PICOU, L.L.P.
Suite 1100 – Two Lakeway Center
3850 N. Causeway Boulevard
Metairie, LA 70002
(504) 834-6500
Of Counsel

DANIEL JOSEPH *
BETH L. HIRSCHFELDER
AKIN, GUMP, STRAUSS, HAUER & FELD, L.L.P.
1333 New Hampshire Ave., N.W.
Washington, D.C. 20036
(202) 887-4000
Counsel for Petitioners
* Counsel of Record

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REPLY BRIEF

The Respondents do not address key points the petition raises, and the objections they do offer are insubstantial.

1. The Respondents do not deny that the petition presents significant issues that affect maritime commerce at ports throughout the country.

2. The Respondents also do not dispute that the Fifth Circuit decision turns upon a non-literal reading of the Federal Maritime Lien Act, and indeed, judicially nullifies an important reform that Congress enacted. The FMLA provides that "a person providing necessaries to a vessel on the order of the owner or a person authorized by the owner . . . has a maritime lien on the vessel . . . *and is not required to allege or prove in the action that credit was given to the vessel.*" 46 U.S.C. § 31342 (emphasis added). But the Fifth Circuit's decision rests on a finding that the testimony of Racal's president "clearly indicates that Raçal did not rely on the credit of the vessels." Pet'r App. 12a. This is just the sort of finding that the Act's terms forbid as a ground for denying a lien. Indeed, the court of appeals admitted, in *Equilease Corp. v. M/V Sampson*, 793 F.2d 598 (5th Cir. 1986)(en banc), on which the *Racal* court relied, that its reading was contrary to the statutory language: "*Despite the language of the Act*, the idea of credit to the vessel being a prerequisite to a lien . . . [is] still very much with us today." *Id.* at 605 (emphasis added).

The Respondents recognize, as candidly as the court of appeals recognized, that even though the Act provides that "it is not necessary to allege or prove that credit was given to the vessel" to obtain a lien, the Fifth Circuit holds that the Act "did not eliminate the requirement that the supplier rely on

the credit of the vessel." Opp'n at 15. Thus Respondents readily admit that the Fifth Circuit's holding reads right out of the Act the language that Congress had put in. The Court should grant certiorari to restore the application of the plain language of the statute.

3. Respondents also seek to deny the existence of a conflict among the Circuits in the application of the FMLA in the Fifth Circuit on the one hand, and the First and Eleventh Circuits on the other. Respondents assert that, in fact, the Circuits all follow the same approach, and that the Fifth Circuit did *not* establish a prerequisite not contained in the Act, but rather merely applied the provision of the FMLA that allows a supplier to waive the right to a maritime lien.

This argument does not avail Respondents. First, the Fifth Circuit opinion does not refer to, much less rely on, the FMLA's waiver provision, now codified at 46 U.S.C. § 31305. Nor does the Fifth Circuit doctrine turn on any notion of waiver. The Fifth Circuit requires proof of reliance on the credit of the vessel as a necessary "prerequisite" to the creation of a lien. *Equilease*, 793 F.2d at 605. Under the Fifth Circuit's formulation, a supplier may fail to obtain a lien simply by lack of knowledge of, or failure to advert to, what would happen in the event that the owner or charterer of the vessel did not pay. *See* Pet. 4, fn.2. The First and Eleventh Circuits expressly declined to make such a holding (*see* Pet. 13), and, by contrast, hold (1) that a lien automatically arises upon the furnishing of necessaries to a vessel, regardless of evidence of how the supplier expected to be paid, and (2) while the lien can be waived under the Act, such a waiver must be a knowing, affirmative act. *Farrell Ocean Servs., Inc. v. United States*, 681 F.2d 91, 92-94 (1st Cir. 1982); *Stevens Tech. Servs., Inc. v. United States*, 913

F.2d 1521, 1536-1537 (11th Cir. 1990).[1] The Fifth Circuit did not require such evidence in the present case, but contented itself with holding that petitioner had not shown that it relied on the FMLA.[2]

This difference is extremely significant. First, the Fifth Circuit's holding renders the waiver provision of the FMLA surplusage – there is no need to have a waiver provision if to establish a lien in the first place it is necessary to show an intention to rely on the statutory lien. Moreover, as Judges Davis, Randall, and Higginbotham correctly observed in dissent in *Equilease*, the Fifth Circuit's doctrine makes the Act a trap for the unwary: "[t]he small, unsophisticated supplier uninformed about liens and unaware that his services or supplies give rise to a maritime line will face a serious problem." *Equilease*, 793 F.2d at 610. In the First and Eleventh Circuits, the Act's requirement that there be an affirmative waiver to deprive a supplier of a lien assures that only persons who know about, and intend not to avail themselves of, the FMLA's provisions, will not give up its

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[1] Respondents provide (Opp'n at 15) an incomplete, and somewhat misleading, quotation from *The President Arthur*, 279 U.S. 564 (1929). This Court there held that the libellant's having specifically obtained other security than a maritime lien, and having by contract stated that that arrangement was exclusive and that there were no other agreements between it and the owner of the vessel, had excluded the possibility of relying on a maritime lien as well. *Id.* at 571-572. Thus the decision does not avail Respondents here.

[2] To put it another way, even assuming that the Respondents are correct and that the Fifth Circuit was merely holding that petitioner had waived its right to a maritime lien under the Act, there would still be a conflict among the Circuits because of the radically different way they interpret what it takes to waive the right to a lien under the Act: in the First and Eleventh Circuits, to be effective, a waiver must be a knowing and deliberate relinquishment of the right to a lien, while in the Fifth Circuit, a waiver can arise through ignorance or failure to state reliance.

protection. In the Fifth Circuit, as the present case shows, the lien can be lost by ignorance or inadvertence.

4. With respect to the Fifth Circuit's holding that the maritime seismic equipment was not furnished to the vessels within the meaning of the FMLA, here again that court expressly states that rather than look to the terms of the statute itself, which say nothing about any requirement that the vessel to which necessaries are supplied be specifically identified, the court would rely on pre-statutory caselaw. Pet. 13a. Respondents recognize, as did the Fifth Circuit, that the holding that a lien fails unless the vessels which are supplied are specifically identified cannot be squared with the text of this Court's opinion in *Dampskibsselskabet Dannebrog v. Signal Oil & Gas Co. of Cal.*, 310 U.S. 268 (1940), allowing a general maritime lien under the FMLA against "any and all vessels owned, chartered, or operated by" the charterer – similarly to the scope of lien sought by Racal here. Like the Fifth Circuit, Respondents seek to evade this Court's decision by characterizing the language in question as dictum and attempting to distinguish that case. Opp'n at 22. However, Respondents do not respond to the showing in the petition, (*see* Pet. 22), that the Fifth Circuit decision creates a conflict among the courts as to how to interpret the *Dampskibsselskabet* opinion on that very point.

Respondents also do not contest that this Court's decision in *Piedmont & George's Creek Coal Co. v. Seaboard Fisheries Co.*, 254 U.S. 1 (1920), which the Fifth Circuit heavily relied on, dealt only with a situation in which the claimed necessary was coal that had been provided for uses that were both maritime and non-maritime. *See* Opp'n at 21. The latter use, of course, is not covered by the Act. But Respondents, like the Fifth Circuit, offer no reason why it was appropriate for the Fifth Circuit to extend *Piedmont* to cases, like the present, in which there is no question that the

necessaries furnished were intended for use on vessels.[3] Instead, Respondents seek to go off on an irrelevant factual byway by disputing whether some portion of the equipment supplied, if taken out of the entire package, could have had a non-maritime use. *See* Opp'n at 21 and fn.3. That is not the issue, however. The question is whether the necessaries are furnished to a vessel, not whether they might also be useful on land. There is no question here that (unlike the coal in *Piedmont*, for example) the marine seismic equipment furnished by Racal, which was designed to be integrated into a vessel's navigation equipment, was supplied for use on vessels only.

CONCLUSION

For the foregoing reasons, as well as those stated in the Petition, the writ of certiorari should be granted.

W. J. LARZELERE, JR., T.A.
J. CALVIN BOX
LARZELERE & PICOU, L.L.P.
Suite 1100 – Two Lakeway Center
3850 N. Causeway Boulevard
Metairie, LA 70002
(504) 834-6500

Of Counsel

DANIEL JOSEPH *
BETH L. HIRSCHFELDER
AKIN, GUMP, STRAUSS, HAUER & FELD, L.L.P.
1333 New Hampshire Ave., N.W.
Washington, D.C. 20036
(202) 887-4000

Counsel for Petitioners

* Counsel of Record

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[3] Respondents correctly point out that the Ninth Circuit so interpreted the FMLA in *Foss Launch & Tug Co. v. Char Ching Shipping U.S.A., Ltd.*, 808 F.2d 697, 701 (9th Cir. 1987). But the sole statutory ground given by the Ninth Circuit for that holding is that "Congress chose not to draft the Act in the passive voice and we think the correct inference is that Congress intended 'furnishing' to require active forethought or advance identification of particular vessels in relation to 'necessaries' supplied." This is a remarkably unconvincing piece of reasoning.